No. 91-471

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; AND JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

On Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

No one disputes that the State of Alabama has a legitimate interest in protecting its citizens against risks to public health that might be posed by hazardous waste despite the extraordinarily detailed federal and state regulatory regimes.[1] Here, Alabama asserts that "[t]he risk created by hazardous waste and other similarly dangerous waste materials is proportional to the *volume* of such waste materials present, and may be controlled by controlling that volume." Br. 38 (citation omitted; emphasis in original). The question in this case is whether the discriminatory means chosen by Alabama to promote that interest complies with the Constitution.

Alabama could have enacted a reasonable, non-discriminatory cap on the amount of waste that may be disposed of annually at the Emelle Facility. Or it could have imposed an even-handed waste disposal tax. Or it could have adopted stricter statutes and/or rules to fill the gaps it perceives in its own existing regulatory plan, which already is stricter than the federal regime. Each of these alternatives, of course, would have imposed equal burdens on Alabama waste generators and out-of-state generators.

Alabama instead chose to impose a heavy tax only on waste generated outside the State. But if Alabama's concern is the risk created by disposal of large amounts of waste and if, as the State concedes (Br. 20), there is no difference in the risk per ton from in-state and out-of-state waste, why does the origin of the waste matter? All that should be relevant is the total amount of waste disposed of at the Emelle Facility and the safety precautions followed there.

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[1] We vigorously *do* dispute Alabama's wildly inaccurate description of the magnitude of those risks. Because that disagreement is not relevant to the legal issue before this Court, however, we have deferred our correction of Alabama's misstatements to pages 19-20, below.

The answer is obvious. Alabama wants to tax the disposal of waste, but it wants to exempt Alabama waste generators from the significant economic burden imposed by that tax. Alabama wants to reduce the volume of waste disposed of at the Emelle Facility, but it wants to ensure that Alabama generators are not inconvenienced by the reduction. In short, Alabama's tax is "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of [waste into the Emelle Facility]. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution." *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 629 (1978). This Court should reverse the judgment below and remand the case for the award of retrospective and ancillary relief. See Pet. Br. 40-42.

I. THE $72 TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

Alabama does not dispute that hazardous waste is an item of "commerce" within the meaning of the Commerce Clause (Br. 23). And it apparently concedes (Br. 31-33, 39-40) that the law imposing the $72 tax discriminates against interstate commerce on its face. Alabama's principal argument (Br. 19-39)—which rests on a tortured reading of *City of Philadelphia* and the so-called "quarantine" cases—is that a state has plenary authority to discriminate against interstate commerce in "dangerous items." It also advances several other purported justifications for the discriminatory tax.[2]

[2] Amici Ohio, *et al.*, assert (Br. 13-16) that discriminatory taxation is justified by a supposed difference between in-state and out-of-state waste: Alabama allegedly lacks the ability to inspect out-of-state waste streams to ensure that each different kind of waste is disposed of in the proper manner. This contention is not properly before this Court because it was not presented to the courts below. *Robertson* v. *Seattle Audubon Soc'y*, No. 90-1596 (U.S. Mar. 25, 1992), slip op. at 11. See also *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 n.4 (1991).

In any event, the factual premise of amici's contention is quite wrong. Alabama's waste management regulations forbid CWM to dispose of any waste without first obtaining "a detailed chemical and physical analysis of a representative sample of the waste." Ala. Admin. Code r. 335-14-6-.02(4)(a)1. The regulations further require CWM to "inspect and analyze each hazardous waste movement received at the facility to determine whether it matches the identity of the waste specified on the accompanying manifest or shipping paper." *Id.* r. 335-14-6-.02(4)(a)4. Finally, the Alabama Department of Environmental Management ("ADEM") plays an active role by requiring out-of-state generators to apply for approval of each waste stream before it may be disposed of in Alabama. *Id.* r. 335-14-3-.08. As part of this pre-approval process, generators must provide ADEM with, among other things, an analysis of the waste, a description of the waste's physical characteristics, and information about the availability of alternative treatment methods or recycling options. *Id.* r. 335-14-3-Appendix II. Alabama plainly has the ability to ensure proper disposal of out-of-state waste streams.

Finally, notwithstanding respondents' contrary assertion (Br. 20 n.24, 40 n.40), Alabama's regulations *do* require brokers to provide the information described above and accordingly fully enable the State to ensure proper disposal of *all* waste delivered to the Emelle Facility.

A. There Is No "Dangerous Items" Exception To The Commerce Clause.

Although Alabama couches its argument in terms of diseased animals and hazardous waste, its "dangerous items" exception to generally-applicable Commerce Clause principles would in fact sweep quite broadly. Much of modern-day commerce, including such common items as paint, chemicals, gasoline, mothballs, and insecticides, may reasonably be denominated as "dangerous." See American Trucking Associations, Inc. (ATA), Am. Br. 7-9. Under Alabama's approach, a state could apply a discriminatory tax to such goods manufactured out of state, while imposing no tax burden on identical in-state goods. There is no basis in this Court's jurisprudence for opening such a gaping loophole in the Commerce Clause.

1. *City of Philadelphia.*

Respondents' "dangerous items" exception to the Commerce Clause's antidiscrimination principle is squarely

inconsistent with this Court's decision in *City of Philadelphia*. There, New Jersey defended its ban on disposal of out-of-state waste on the ground that waste disposal was detrimental to public health and the environment. The state supreme court found that the law "advanced vital health and environmental objectives." 437 U.S. at 620; see also *id.* at 625. This Court did not overturn the lower court's determination that the purpose and effect of the statute was to protect public health. It instead concluded that "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-627.

Respondents recognize (Br. 15) that their theory is inconsistent with "the language of" *City of Philadelphia* and argue that the Court's opinion does not mean what it says. According to respondents (Br. 15, 21-22), *City of Philadelphia* actually rests on the Court's determination that New Jersey failed to prove that waste is dangerous to public health. The Court supposedly held the statute unconstitutional because it determined that New Jersey was seeking to "protect in-state interests from out-of-state economic competition" (Br. 19).

Respondents fail to understand that even though a statute's overall purpose and effect may be to protect public health, the discriminatory aspect of that statute may be "protectionist," and therefore violative of the Commerce Clause, because it is not justified by public health concerns. The critical focus is whether "*the discrimination* is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 800 (1992) (emphasis added). "Economic protectionism" thus constitutes a label embodying the legal conclusion that the particular provision in question *either* was enacted with the purpose of protecting in-state economic interests *or* has the effect of protecting such interests by discriminating unnecessarily against interstate commerce. See Pet. Br. 26-28 & nn. 16-17.

Consistent with this principle, the Court held in *City of Philadelphia* that—even if the New Jersey legislature actually was motivated by a desire to protect public health and even if barring disposal of out-of-state waste would in fact have that effect—New Jersey's public health argument could not justify discriminating against interstate waste because there was "no basis to distinguish out-of-state waste from domestic waste" by reference to "[t]he harms caused by waste." 437 U.S. at 629.

Here, just as in *City of Philadelphia*, the particular legislative means are plainly protectionist. Given Alabama's stated purpose—reducing the volume of waste disposed of at the Emelle Facility—and the undisputed fact that in-state waste and out-of-state waste are indistinguishable, the State can have no health-related reason for taxing only out-of-state waste and exempting Alabama waste from the burdensome tax. That is pure protectionism. See Pet. Br. 26. The Court's conclusion in *Wyoming* v. *Oklahoma*, *supra*, is applicable here as well: "Such a preference for [waste] from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to [tax waste generated] in other States based solely on its origin." 112 S. Ct. at 800. See also *New Energy Co.* v. *Limbach*, 486 U.S. 269, 279 (1988) (discriminatory nature of tax provision could not be justified on public health grounds because the distinctions based on state of origin were unrelated to that purpose).

2. *The Quarantine Cases.*

Respondents rely heavily (Br. 24-39) upon the quarantine cases as support for their contention that states may exercise plenary authority to discriminate against interstate commerce in "dangerous items." In fact, the principle established by the quarantine cases is considerably more limited than the broad proposition advanced by respondents.

There are significant factual differences between the present case and all of the quarantine cases. Each of the

state laws upheld as quarantines in fact imposed a quarantine—it *banned the importation* into the State of designated animals or crops in order to protect public health and/or the environment. Moreover, these statutes all addressed situations in which public health and/or the environment was threatened by a pest or *communicable* disease. Because neither of these factors is present in this case, the $72 tax cannot be upheld on a quarantine theory.

Many of the opinions in the quarantine cases provide little explanation of the basis for the ruling. *Reid* v. *Colorado*, 187 U.S. 137 (1902), is an exception. The Court there considered a challenge to a Colorado statute that "prevent[ed] the introduction of infectious or contagious diseases among the cattle and horses of that State." *Id.* at 138. The statute prohibited the bringing into the State of cattle and horses that either "ha[d] an infectious or contagious disease" or had been in contact with such animals within 90 days prior to their importation. *Id.* at 138-139.

This Court upheld the quarantine. It first observed that "the purpose of a statute * * * must be determined by its natural and reasonable effect" and that "a State may not, by its police regulations, *whatever their object*, unnecessarily burden foreign or interstate commerce." 187 U.S. at 150-151 (emphasis added). The Court determined that the Constitution does not convey

> the *right* to introduce into a State, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the State will or may be injurious to its domestic animals. The State * * * may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States.

Id. at 151 (emphasis in original). The Court concluded that because Colorado had reasonably determined that all animals falling within the terms of the statute are "ordinarily, in such condition that their presence in the State may be dangerous to its domestic animals," the import ban did not violate the Commerce Clause. *Ibid.*

Reid makes clear that the fact that the diseased animals posed a danger to Colorado livestock did not by itself preclude Commerce Clause scrutiny of the state legislation. The Court still found it necessary to ensure that "the means employed * * * do not go beyond the necessities of the case or unreasonably burden the exercise of [constitutional] privileges." 187 U.S. at 151. That standard is virtually identical to the one applicable to any statute that discriminates against interstate commerce: whether the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278. Thus, respondents are plainly wrong in contending that the quarantine cases establish a unique exception to ordinary Commerce Clause analysis for statutes regulating "dangerous" items. Indeed, respondents themselves acknowledge (Br. 33) that the generally-applicable *New Energy Co.* standard "is a succinct expression of the reasoning employed by the Court" in the quarantine cases.

The reason that the results in the cases upholding quarantine measures differ from the result in *City of Philadelphia*, and from the proper result in this case, is not the legal test. Rather, the explanation is the particular nature of the "legitimate local purpose" underlying the statutes at issue in the quarantine cases and the rationality of the state's decision to ban all importation of the quarantined product. The Court observed in *Reid* that the statute reflected the State's determination that the presence within its borders of *any* diseased livestock posed a threat to Colorado cattle and horses. It further found that the State's determination was reasonable. As respondents themselves point out (Br. 38), it is obvious why a quarantine is a reasonable response to a threat of a contagious disease or other pest: "These living organisms multiply on their own; one germ becomes millions of germs, and the millions of germs cause the harm sought

to be avoided." Because no measure short of a quarantine could protect the State against the risk of widespread transmission of the disease to local animals, the statute was upheld.

The same rationale animates the rest of the quarantine cases. Each of the quarantines rested on the state's reasonable determination that the mere presence within its borders of even a single additional infected plant or animal would be dangerous to public health or the environment because of the risk that the contagion would spread.[3]

Here, Alabama has invoked a very different—and much more limited—local purpose. Alabama does not, and can-

[3] *Maine* v. *Taylor*, 477 U.S. 131 (1986); *Mintz* v. *Baldwin*, 289 U.S. 346, 349-350 (1933); *Oregon-Washington Railroad & Navigation Co.* v. *Washington*, 270 U.S. 87, 93, 95-96 (1926); *Asbell* v. *Kansas*, 209 U.S. 251, 254, 256 (1908); *Smith* v. *St. Louis & Southwestern Railway*, 181 U.S. 248, 257-258 (1901); *Rasmussen* v. *Idaho*, 181 U.S. 198, 201-202 (1901); *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U.S. 613, 628, 630 (1898); see also *Compagnie Francaise de Navigation a Vapeur* v. *Louisiana State Board of Health*, 186 U.S. 380 (1902) (exclusion of healthy persons from area infested with contagious disease); *Bowman* v. *Chicago & Northwestern Railway*, 125 U.S. 465, 489, 490-491 (1888) (ban on importation of liquor held unconstitutional; although state had declared liquor injurious to public health, that was not sufficient to extend quarantine theory beyond class of objects that threaten to spread contagion); *Railroad Co.* v. *Husen*, 95 U.S. 465 (1877) (quarantine statute held unconstitutionally broad).

A number of cases cited by respondents (Br. 19-20 n.23) do not address the constitutionality of quarantine statutes. *Sligh* v. *Kirkwood*, 237 U.S. 52 (1915) (ban on sale, shipment, and delivery of citrus fruit not fit for consumption); *Crossman* v. *Lurman*, 192 U.S. 189 (1904) (ban on manufacture, possession, and sale of adulterated foods or drugs); *Louisiana* v. *Texas*, 176 U.S. 1 (1900) (denying leave to file a bill of complaint on jurisdictional grounds); *Kimmish* v. *Ball*, 129 U.S. 217 (1889) (upholding statute imposing liability for damage caused by diseased cattle). Respondents place considerable reliance (Br. 25-27) on *Clason* v. *Indiana*, 306 U.S. 439 (1939), but that case did not involve a quarantine or any other form of import ban. It involved a ban on *exporting* of dead animals. Certainly the legal principles underlying that decision cannot be controlling in determining the constitutionality of an entirely different type of statute.

not, justify the tax on the ground that the presence of a single additional ton of waste in the State presents an uncontrollable threat to public health. Respondents state that "[i]t is not necessary * * * to exclude the first drum [of waste] in order to control the potential harm of millions of drums" (Br. 38); Alabama wishes only to curtail the total volume of hazardous waste *disposed of* within the State, not to exclude all waste.[4] Indeed, because "the purpose of a statute * * * must be determined by its natural and reasonable effect" (*Reid*, 187 U.S. at 151), and the natural effect of the tax is to reduce *disposal* volume—not to prohibit, or even limit, the movement of waste into the State—that must be Alabama's purpose.[5]

Alabama's purpose here, unlike the purpose underlying the quarantine measures, *can* be achieved by less discriminatory means: for example, a reasonable even-handed cap on disposal volumes or an even-handed tax on disposal of hazardous waste. There accordingly is no justification for upholding the discriminatory tax. See *City of Philadelphia*, 437 U.S. at 629 (observing that the New Jersey statute could not be upheld on a quarantine theory because it did not "simply prevent[] traffic in noxious articles" and because there was no claim "that

[4] Moreover, as respondents themselves point out (Br. 38), the risk invoked by Alabama is significantly different in kind from that posed by a plant or animal infected with a contagious disease or other living organism: "Drums of hazardous waste, of course, do not reproduce."

[5] Respondents hint in a footnote (Br. 23 n.26) that the State is entitled to justify the discriminatory tax on the basis of the potential health risk from movements of waste within Alabama. But—in sharp contrast to the quarantine statutes, which banned *importation* of the prohibited items and therefore directly regulated transportation—Alabama's tax applies only to disposal and does not limit transportation of waste at all. Thus, Alabama cannot invoke that purpose to justify the tax. See also *Illinois* v. *General Elec. Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) (rejecting argument based on alleged transportation risks because statute in question did not regulate transportation).

the very movement of waste into or through New Jersey endangers health").[6]

In sum, Alabama's discriminatory tax is wholly distinguishable from the measures upheld in the quarantine cases. Contrary to respondents' claim (Br. 35-36), the Court can invalidate the tax without disturbing that line of precedents.

B. The Discriminatory Tax Cannot Be Justified By Reference To Future Financial And Environmental Risks Supposedly Borne By Alabama.

Amici National Governors' Association, *et al.*, (NGA) contend that the Additional Fee is not really discriminatory because it merely compensates Alabama citizens for the risks associated with hosting a hazardous waste disposal facility. Respondents hint (Br. 40-41) at a similar claim. To the extent such risks exist, of course, they would not vary with the waste's state of origin. Accordingly, they provide no basis for a discriminatory tax. Pet. Br. 34-35.[7]

[6] Respondents argue (Br. 36-39) that the rationale of the quarantine cases applies equally to "economic disincentive[s]" because a state is entitled to vary its response depending on the nature of the environmental threat. But, as we have shown, the quarantine cases do not rest on some notion of expanded state authority in the area of public health. They uphold what is indisputably "strong medicine" in terms of impact on interstate commerce—a total ban on imports into a state—where a state can properly invoke a very important interest and there are no nondiscriminatory means to protect that interest. (Even *Mintz* v. *Baldwin*, 289 U.S. 346 (1933), on which respondents rely (Br. 37), involved a flat ban on imports of infected cattle for the particular purposes that presented a threat to the environment.) The question in each case must be whether the state's purpose is legitimate and whether the state has shown that it cannot effectuate its purpose through less discriminatory means.

[7] Respondents state (Br. 40-41) that the "act[] of God" exception "swallows" CERCLA's rule that all generators, owners, and operators are jointly and severally liable for the costs of remediating releases at a hazardous waste disposal facility, implying that Alabama ultimately will be left holding the bag in the event of a natural disaster at the Emelle Facility. But that exception applies *only* when an unforeseeable natural disaster is the *sole* cause of a release. 42 U.S.C. § 9607(b). Even if a natural disaster were the sole cause of a release, respondents' suggestion that Alabama would have to bear the full cost of the cleanup is flatly wrong. To begin with, EPA's RCRA regulations require operators of hazardous waste disposal facilities to take corrective action whenever there is a release, *regardless of the cause*. 40 C.F.R. § 264.100-264.101. Moreover, if petitioner were for some reason unable to take the required corrective action, the federal government is authorized to do so. See 42 U.S.C. § 9604(a).

NGA contends that the tax is nonetheless even-handed. Because the citizens of Alabama already bear the future risks from Alabama-generated waste by virtue of the Emelle Facility's presence in the State, the argument goes, they may insist on compensation from out-of-state industry for accepting the future risks associated with out-of-state waste.

The notion that a tax can be rendered non-discriminatory by considering unquantifiable burdens on in-state residents as a whole is preposterous. Indeed, this Court has refused even to weigh different taxes against each other, stating: "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens." *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 289 (1987) (internal quotation marks and citation omitted).[8]

The compelling logic underlying the Court's refusal to engage in the "weighing of comparative tax burdens"

[8] NGA does not even cite, let alone reconcile, *Scheiner* or the Court's other cases making it crystal clear that a facially discriminatory tax will be considered non-discriminatory if and only if it merely complements a similar tax on "substantially equivalent" in-state activity. See, *e.g.*, *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Rev.*, 483 U.S. 232, 244 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 643 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331-332 (1977).

applies with even greater force to the weighing of tax burdens against unquantifiable burdens of "potential environmental and health problems" (NGA Br. 15). Indeed, the fundamental flaw in NGA's argument is that there is no way of determining the point at which a tax goes beyond simply compensating for the inchoate burdens associated with being a host state: is it $50 per ton, $72 per ton, $100 per ton, or $1,000 per ton?[9] Nor is there any sound reason for refusing to weigh into the balance both the unquantifiable benefits enjoyed by Alabama citizens from the out-of-state products whose manufacture resulted in the generation of hazardous waste and the unquantifiable health and safety risks borne by the citizens of the states in which those products were manufactured. If weighing comparative tax burdens is a "morass," weighing unquantifiable potential harms is a bottomless tar pit.

C. Alabama's Asserted Interest In Making A Privately-Owned Waste Disposal Facility Available To Intrastate Commerce, But Not To Interstate Commerce, Is Not A "Legitimate Local Purpose."

Alabama does not rely solely on health and safety justifications in defending the discriminatory tax. Apparently recognizing that those factors alone cannot justify the discrimination against interstate commerce, respondents also assert (Br. 45) an interest in "providing for the regulated disposal of the State's own dangerous waste." Depicting itself as a state that has "accept[ed] responsibility for providing for the disposal of its own waste" (Br. 46), Alabama asserts the right to do so

[9] Relying upon *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), NGA asserts (Br. 17-18 n.13) that this Court does not require that in-state and out-of-state burdens be identical. But *Clover Leaf* did not involve discrimination against interstate commerce. The issue there was whether the state law at issue imposed a "clearly excessive" burden on interstate commerce. *Clover Leaf Creamery*, 449 U.S. at 471. By definition, exactitude is unnecessary when applying that standard.

without being forced to permit disposal of out-of-state waste as well.

The most obvious flaw in Alabama's argument is that the State does not own the Emelle Facility. It did not make the investments in research, technology, and personnel required to establish that facility and comply with the myriad regulations governing every aspect of its operations. Thus, while respondents' brief is full of self-serving assertions of "responsibility," Alabama—and its many businesses that generate hazardous waste—are in fact beneficiaries of petitioner's investments.

What Alabama seeks, therefore, is not the right to provide for disposal of waste generated within the State. It seeks to force *petitioner*—a private entity—to serve in-state commerce on a preferred basis. Far from a "*legitimate* local purpose," no state interest could conflict more squarely with the Commerce Clause's basic goal—making "our economic unit * * * the Nation." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 537 (1949).

This Court has recognized "the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'" *City of Philadelphia*, 437 U.S. at 627 (citation and footnote omitted). Alabama plainly could not levy a tax on private landowners' sales of timber to out-of-state persons, exempting all sales to Alabama residents, on the ground that it wanted to limit the risk of deforestation but at the same time ensure that its citizens had enough lumber. Neither could the State require Alabama steel mills to purchase coal from local mines on the ground that a shut-down of those mines would create environmental hazards. The Commerce Clause bars the states from restricting a business's access to the interstate market in order to ensure that the business serves local interests. But that is precisely what the State seeks to do here.

Were respondents' argument accepted, a state could close its borders to indigents from other states on the ground that it should be permitted to take care of its own problems without also having to take care of the problems of other states. Yet this Court has struck down just such a law as violative of the Commerce Clause. *Edwards* v. *California*, 314 U.S. 160 (1941). Under respondents' theory, a state could forbid private hospitals from caring for out-of-state patients: why, the state could ask, should we bear the burdens associated with caring for out-of-state residents merely because other states did not site enough hospitals to serve their own citizens? Cf. *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974). Similarly, respondents' theory would justify a state law barring private employers from hiring out-of-state residents to work on a state-sponsored project. The state could argue that by sponsoring the project it had acted "responsibly to address its unemployment problem and should not have to help other states deal with theirs. Cf. *United Bldg. & Constr. Trades Council* v. *City of Camden*, 465 U.S. 208 (1984). If statutes such as these were valid, however, the theory upon which the Commerce Clause was based no longer would be.[10]

D. A State May Not Discriminate Against Interstate Commerce In Order To Make Up For What It Perceives To Be The Shortcomings Of Its Sister States.

Respondents (Br. 40, 42-43) and amici South Carolina, *et al.* (Br. 3-4, 8-20, 25-26), complain that other states have failed to provide for disposal of the hazardous waste generated within their borders, thus transferring to those states with existing disposal facilities the burden of that waste. They further assert tnat the federal government has failed to induce states to site new disposal facilities. According to respondents and their amici, those states that already host facilities should be permitted to use self-help to accomplish what Congress and the EPA have failed to do. Without the ability to discriminate, respondents warn, no state will authorize new disposal facilities.[11]

This policy argument has no basis in this Court's precedents: the Commerce Clause does not have a "self-help" exception. Assuming for current purposes that the federal statutory and regulatory scheme has failed to achieve its goals, Congress—not this Court—is the appropriate forum for such arguments. As the United States observed in its brief at the petition stage (at 11), the concerns of Alabama and its amici "may properly be presented to Congress as a basis for urging enactment of federal legislation specifically authorizing States within which major hazardous waste disposal facilities are located to adopt designated limitations on interstate waste shipments." [12]

Indeed, the history of the Low-Level Radioactive Waste Policy Amendments Act (LLRWPAA) of 1985 illustrates that Congress can be quite responsive to such requests. Before enactment of that legislation, two federal appellate courts had invalidated state statutes banning the disposal of out-of-state nuclear waste. See

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[10] Remarkably, respondents contend (Br. 41) that any disadvantage to out-of-state generators is a result of the failure of their own states to provide a means of waste disposal, not a result of Alabama's discriminatory tax. On that theory, no discriminatory statute would ever violate the Commerce Clause: the disadvantage to the out-of-state business could always be blamed on the failure of its own state to provide a parallel discriminatory advantage.

[11] The fact that the Additional Fee applies with full force to generators in states that *have* sited hazardous waste disposal facilities proves that this argument is a post hoc rationalization that had nothing to do with the actual purpose of the Additional Fee.

[12] The policy statement of the National Governors Association (NGA), on which respondents (Br. 12-13) and their amici rely, does *not* endorse self-help by states such as Alabama. Rather, it calls on Congress to act and endorses some protection for waste generators in states without disposal facilities, such as a phase-in period for any discriminatory fees. Moreover, respondents are wrong in asserting that the NGA has endorsed a particular multiple for discriminatory fees. The NGA in fact has not taken a position on that question. (Respondents' references are to a report issued by a subgroup that was not endorsed by the full association.)

Washington State Bldg. & Constr. Trades Council v. *Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *Illinois* v. *General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983). In the wake of those decisions, Congress concluded that there were not adequate incentives for states to authorize additional sites for disposal of such waste. It accordingly enacted the LLRWPAA, which provided a range of incentives for the siting of new disposal facilities, including a provision authorizing host states in particular circumstances to discriminate against waste generated in states that had not sited facilities. See 42 U.S.C. § 2021e(e).[13]

If Alabama and its amici want to be able to discriminate against out-of-state hazardous waste as a means of forcing other states to site disposal facilities, they should follow the model of the LLRWPAA and seek authorization from Congress, which can weigh the competing interests of the states, together with the national interest in a safe and efficient waste disposal system, and craft an appropriate solution. In the absence of such authorization, discriminatory taxes are not a permissible means of accomplishing the states' goals.

II. CONGRESS HAS NOT AUTHORIZED THE STATES TO IMPOSE DISCRIMINATORY TAXES ON OUT-OF-STATE WASTE.

New York and South Carolina assert that Alabama's facially discriminatory Additional Fee does not run afoul of the Commerce Clause because Congress has authorized the states to impose discriminatory taxes on out-of-state waste. New York candidly (and correctly) concedes (Br. 4 n.3) that Alabama did not preserve this issue in

[13] Some *other* provisions of that Act have been subject to constitutional challenge (see *New York* v. *United States*, No. 91-543 (argued Mar. 30, 1992)), but there is no dispute that Congress may authorize a state to discriminate against interstate commerce in order to provide other states with an incentive to site disposal facilities.

the courts below. Indeed, respondent Sizemore filed a brief in the trial court asserting that "[t]he present case falls within the scope of the dormant Commerce Clause, because Congress has not specifically regulated in the area of fees imposed on the commercial disposal of hazardous waste." R. 2064.

Because these statutory authorization arguments were not "squarely considered by the [lower courts] nor advanced by respondents in this Court," the Court should decline to address them. *Robertson* v. *Seattle Audubon Soc'y*, No. 90-1596 (U.S. Mar. 25, 1992), slip op. at 11. See also *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 n.4 (1991). Application of this principle is particularly appropriate when, as here, the issue presented by the amici is of importance to the United States but has been raised only after the United States has filed its briefs. (We have lodged with the Clerk of this Court a copy of an amicus brief filed by the United States in a Fourth Circuit case presenting similar issues.)

In any event, the amici's various authorization arguments are meritless. This Court has made it crystal clear that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause as [New York and South Carolina] here seek[] to justify." *Wyoming* v. *Oklahoma*, 112 S. Ct. at 802.

The Superfund Amendments and Reauthorization Act (SARA), upon which New York places its exclusive reliance, in no way "manifest[s]" Congress's "unambiguous intent" to permit facially discriminatory taxes of the sort at issue here. SARA merely requires states to ensure disposal capacity for in-state wastes upon pain of losing Superfund monies. Nothing in the language of the Act authorizes states to accomplish this goal by means of facially discriminatory taxes. *National Solid Wastes Management Ass'n* v. *Alabama Dep't of Environmental Management*, 910 F.2d 713, 721-722 (11th Cir. 1990), modified on other grounds, 924 F.2d 1001, cert. denied,

111 S. Ct. 2800 (1991); *Hazardous Waste Treatment Council* v. *South Carolina*, 945 F.2d 781, 792, 794-795 (4th Cir. 1991).

Amici South Carolina, *et al.*, rely upon a different statute, contending (Br. 2, 22-24) that the provision of the Resource Conservation and Recovery Act (RCRA) authorizing "more stringent" state regulations, together with a decision by the EPA approving South Carolina's discriminatory fee under RCRA, indicate that states generally are authorized to discriminate against out-of-state waste. As with SARA, the language of RCRA provides not the least indication that Congress intended to abrogate the Commerce Clause's antidiscrimination principle in the hazardous waste management area. Indeed, the "savings clause" on which South Carolina relies (42 U.S.C. § 6929) is indistinguishable from the federal provision held insufficient to authorize discriminatory state legislation in *Wyoming* v. *Oklahoma*, 112 S. Ct. at 802. See also *Hazardous Waste Treatment Council*, 945 F.2d at 792.

South Carolina also relies on a provision of the statute stating that, upon a determination by the EPA that a state's hazardous waste regulatory program is "consistent with" federal law and other state programs, the state may engage in hazardous waste regulation "in lieu of" the federal program. 42 U.S.C. § 6926. One provision of the EPA regulation implementing this consistency requirement provides that a state program will be found "inconsistent" if an aspect of the program "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States." 40 C.F.R. § 271.4.

Neither of these provisions provides the requisite unambiguous manifestation of *congressional* intent to effect an "affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982) (citation omitted). See *Hazardous Waste Treatment Council*, 945 F.2d at

793-794. Congress plainly contemplated that the states would employ their already-existing police power to establish a state hazardous waste management program that would, in turn, be reviewed by the EPA. The "consistency" requirement set forth in the statute and spelled out in the regulation is a *limitation* on the types of laws that may be included in a state's authorized plan. A limit on state authority simply cannot constitute a clear and unambiguous authorization of expanded state authority.[14]

Finally, to the extent the RCRA process has any relevance to the Commerce Clause issue, the fact that EPA may have blessed South Carolina's fee is irrelevant here, as the amici acknowledge (Br. 2). Here, not only has EPA not approved Alabama's discriminatory fee, it has signed a brief in this Court urging that the fee be struck down as violative of the Commerce Clause.

III. RESPONDENTS HAVE DISTORTED THE NATURE OF THE ALLEGED RISKS.

As indicated above (at 1 n.1), facts regarding the Emelle Facility or hazardous waste management generally are irrelevant to the issue before this Court: the only relevant fact is the undisputed determination that in-state waste is indistinguishable from out-of-state waste. Nonetheless, because respondents' overall presentation of the facts as well as several of their specific factual assertions are either inaccurate or misleading, we feel compelled to set the record straight.

The most important distortion in respondents' brief is the overall picture they paint of a ticking toxic timebomb that presents an imminent threat of harm to Alabama residents. But, as we discussed in our opening brief (at 12-13), the trial court's findings relate to unlikely contingencies: given the strict regulatory scheme and the

[14] Thus, in order to be valid and enforceable, a state statute must comply with both the consistency requirement (which is administered by the EPA) *and* the Commerce Clause (which is enforced by the courts).

extreme impermeability of the 700 foot thick layer of chalk underlying the Emelle Facility, the trial court could not—and did not—find that any of the potential risks it identified were likely ever to become reality. Respondents' assertion (Br. 36, 39) that Alabama citizens are under a perpetual threat of "disease, pestilence, and death" is unfounded and irresponsible.

Space limitations do not permit us to respond to all of respondents' assertions. In addition to those discussed above (at 3 n.2, 10-11 n.7), we here highlight two more.

First, respondents rely (Br. 5) upon a GAO report for the assertion that the Emelle Facility has a serious leakage problem. However, the report does not purport to address the Emelle Facility specifically; rather it reports on hazardous waste facilities generally (including non-commercial facilities). As respondent Hunt himself has acknowledged, the Emelle Facility is "probably one of the safest such facilities in the country." J.A. 66.

Second, respondents spill much ink creating the implication (Br. 5-7) that "poisonous leachate" from the Emelle Facility has escaped into the environment. That claim is false. Petitioner maintains dozens of monitoring wells surrounding the disposal trenches that contain hazardous waste. These wells, which serve as an "early monitoring system" to detect migration of hazardous materials out of the trenches, are routinely checked for the presence of contaminants. There is no evidence of migration of leachate from the trenches. Tr. 156 (testimony of Rodger Henson).

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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